

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID EARL WHITE,

Defendant-Appellant.

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UNPUBLISHED

December 28, 2004

No. 249815

Genesee Circuit Court

LC No. 02-010257-FH

Before: Murphy, P.J., White and Kelly, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from his second habitual offender sentence of three to seven and one-half years imposed on his plea-based conviction of larceny by conversion, MCL 750.362; MCL 769.10. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The legislative sentencing guidelines control in this case because the charged offense occurred after January 1, 1999. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000). According to these guidelines, the trial court must impose a minimum sentence within the guidelines' range unless a departure from the guidelines is permitted. MCL 769.34(2). A court may depart from the guidelines if it has substantial and compelling reasons for that departure and states the reasons on the record. MCL 769.34(3). The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where the offense characteristics or offender characteristics considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a), (b).

Any factor relied on by the trial court in departing from the statutory sentencing guidelines must be objective and verifiable. This Court reviews the trial court's determination of the existence of any such factor for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). Whether a particular factor is objective and verifiable is reviewed as a matter of law. *Id.* The trial court's determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id.* at 264-265. Substantial and compelling reasons justifying departure should "keenly" and "irresistibly" grab the court's attention, must be "of considerable worth" in determining the length of a sentence, and "exist only in exceptional cases." *Id.* at 257, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). A sentence that

departs from the guidelines' range must also be proportionate to the defendant's conduct and his criminal record. *Id.* at 261-264.

Defendant was sentenced as a second habitual offender. Under the sentencing guidelines act, the sentence of a habitual offender is subject to an increased minimum sentence range. MCL 777.21(3); *People v Houston*, 261 Mich App 463, 474; \_\_\_ NW2d \_\_\_ (2004). Here, unless substantial and compelling reasons existed to depart from the guidelines, the trial court was required to sentence defendant to a minimum term within that range or to an intermediate sanction that could include a term of imprisonment not exceeding twelve months. MCL 769.34(4)(d). The trial court found that substantial and compelling reasons existed to depart from the guidelines, and sentenced defendant to three to seven and one-half years in prison.

In support of departure, the trial court stated on the sentencing departure evaluation form:

Insufficient weight to the prior record variables causes the Court to believe substantial and compelling reasons exist to depart from the Guidelines to place [defendant] in prison as opposed to an intermediate sanction in the community. He is a danger to society as he had demonstrated with 6 felony convictions, and with his cocaine addiction he is unlikely to succeed in a community based sentence. He needs to be incarcerated for the Court to achieve the protection of society, punishment of the defendant and even rehabilitation via the CPI in residence treatment program.

Here, although defendant's prior record of five felonies and one misdemeanor was accounted for in the sentencing guidelines, MCL 777.52 and 777.55, the trial court correctly found that the guidelines gave inadequate weight to the nature of defendant's prior convictions, which started in 1982, and included three felony convictions for larceny by conversion and one felony conviction involving forgery. MCL 769.34(3)(b). The nature of defendant's prior record was objective and verifiable, and irresistibly attracted the attention of the trial court. Furthermore, the trial court properly reasoned that defendant's admitted addiction to cocaine, which was objective and verifiable, was not accounted for in the guidelines and rendered defendant a danger to the community due to his admission that his addiction caused him to commit the instant conversion offense. Past attempts at rehabilitating defendant had failed. The trial court properly took into account the most appropriate and potentially successful method of getting defendant treatment for his substance abuse. The trial court did not err in determining that the departure resulted in a sentence more proportionate to the seriousness of the offense and the defendant's criminal history than would adherence to the guidelines range. *Babcock* at 262-264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Accordingly, the trial court did not abuse its discretion by departing upward from the guidelines and sentencing defendant to prison rather than imposing a term within the guidelines or an intermediate sanction. MCL 769.34(4)(d); *Babcock*, *supra* at 265-269.

In his supplemental brief on appeal, defendant also asserts that *Blakely v Washington*, 542 US \_\_\_; 124 S Ct 2531; 159 L Ed 2d 403 (2004), mandates resentencing in this case. However, in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), a majority of our Supreme Court held that *Blakely* does not apply to Michigan's system of indeterminate sentencing because under that system the maximum term is not set by the sentencing court, but rather is determined by statute. MCL 769.8. Defendant is not entitled to resentencing.

Affirmed.

/s/ William B. Murphy

/s/ Helene N. White

/s/ Kirsten Frank Kelly